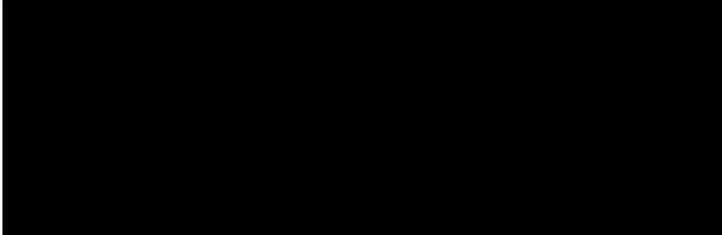




U.S. Citizenship
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FILE: WAC 04 007 51200 Office: CALIFORNIA SERVICE CENTER Date: SEP 19 2005

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner operates a chain of fast food restaurants and indicated in the initial petition that it had six employees. It seeks to extend the employment of the beneficiary as a full-time accountant. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel submits a brief and supporting documents.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) counsel's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a full-time accountant. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and counsel's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail (1) preparing the company's balance sheets, profit and loss statements, necessary checks, payroll, tax remittances, and other reports to summarize the company's current and projected financial position; meeting with external auditors and discussing accounting matters concerning the restaurant business (40% of time); (2) preparing company's general ledger, monthly and yearly financial reports; compiling and analyzing financial information to prepare entries to the company's accounts (20% of time); (3) detailing company's assets, liabilities and capital; advising and making recommendations to management regarding tax strategies; advising restaurant business on the advantages and disadvantages of certain business decisions or transactions (15% of time); (4) maintaining inventory of the restaurant supplies; maintaining a financial system that will help the company ensure a systematic and smooth inventory procedure (10% of time); (5) modifying and coordinating accounting procedures; monitoring the budget, performance evaluation and cost and asset management (10% of time) (6) preparing business letter correspondences with the existing suppliers and corporate accounts regarding certain transactions, financing and billing statements; implementing a system that will be available to other accountants at the conclusion of his period of stay (5% of time). The petitioner indicated that a bachelor's degree in accounting or its equivalent was required for the position.

The director requested additional evidence, specifically that the proffered position meets a criterion to be a specialty occupation. The director requested evidence that the beneficiary is qualified to perform in the claimed specialty occupation. The director requested copies of the petitioner's federal incomes taxes, quarterly wage reports and an organizational chart.

In response, the petitioner noted that it indicated it operated three restaurants in the initial petition in error but it actually has five restaurants and 23 employees. The petitioner submitted Form 1120S Federal Income Tax Return indicating \$281,287 in gross receipts or sales for year 2000. The petitioner stated that the beneficiary is working out of one location but is managing the accounting for all five restaurants. The petitioner submitted DE-6 forms for one location which indicated five employees. The organization chart listed the five employees of one location. The petitioner included several internet job postings for accountants. Additionally, the petitioner submitted a letter from a professor of finance discussing the beneficiary's qualifications and that the duties of the proffered position require a bachelor's degree.

The director determined that the proffered position was not a specialty occupation. The director indicated that some of the duties of the position described by the petitioner appear to reflect many of those performed by accountants as listed under Accountants and Auditors in the Department of Labor's *Occupational Outlook Handbook (Handbook)*. The director indicated that sole reliance on a list of duties resembling those of an accountant taken from the *Handbook* to establish that the proffered position was an accountant was misplaced.

The director found the evidence failed to establish that the petitioner engages in the type of business that would require an accountant on a regular full-time basis, for any significant length of time. The director concluded that there is no reasonable expectation that the petitioner's business would utilize the beneficiary solely in the capacity as an accountant or auditor exclusively in the review, analysis, and reporting of the petitioner's accounting records. The director found that the duties of the proffered position are more those of

a bookkeeper or accounting clerk or auditing clerk. The director determined that the petitioner failed to establish that the proffered position requires a baccalaureate or higher degree or its equivalent.

On appeal, the petitioner asserts that the director made no mention of the submitted opinion letter. The petitioner contends that the opinion letter and the *Handbook* support its assertion that the proffered position is a specialty occupation. The petitioner notes that the director referred to the petitioner as an importer of plumbing fixtures and surmises that the “entire analysis and conclusions of the [decision] are but built on an artificial foundation.”

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria include: whether the *Handbook* reports that the industry requires a degree; whether the industry’s professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms “routinely employ and recruit only degreed individuals.” See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

A review of the *Handbook* reveals that specific job duties vary widely among the four major fields of accounting: public, management, government, and internal. The closest category to the proffered position is the management accountant. In the *Handbook*, management accountants — also called cost, managerial, industrial, corporate, or private accountants — record and analyze the financial information of the companies for which they work. Other responsibilities include budgeting, performance evaluation, cost management, and asset management. Usually, management accountants are part of executive teams involved in strategic planning or new-product development. They analyze and interpret the financial information that corporate executives need to make sound business decisions. They also prepare financial reports for nonmanagement groups, including stockholders, creditors, regulatory agencies, and tax authorities. Within accounting departments, they may work in various areas, including financial analysis, planning and budgeting, and cost accounting.

Very few of the duties described in the *Handbook* apply to the proffered position. According to the *Handbook*, accountants prepare financial reports for nonmanagement groups, including stockholders, creditors, regulatory agencies, and tax authorities, and usually, they are part of executive teams. The beneficiary will not be part of an executive team. Nor will the beneficiary prepare financial reports for

nonmanagement groups such as stockholders, creditors, regulatory agencies, and tax authorities; or be involved in budgeting, performance evaluation, cost management, and asset management. Given this significant dissimilarity, the scope and complexity of the beneficiary's duties and responsibilities do not rise to the level of an accountant. Consequently, a bachelor's degree in accounting or a related field – which the DOL states is required for a management accountant – would not be required for the proffered position.

While it is true that not all accountants are part of an executive team, the *Handbook's* delineation of a management accountant as part of an executive team involved in strategic planning or new-product development illustrates the scope and complexity of a management accountant's responsibilities. Likewise, the role of the accountant to prepare financial reports for nonmanagement groups, including stockholders, creditors, regulatory agencies, and tax authorities also illustrates the level of a management accountant's responsibilities. Because the beneficiary will not be part of an executive team and will not prepare financial reports for nonmanagement groups, including stockholders, creditors, regulatory agencies, and tax authorities, this indicates that the beneficiary's duties do not rise to the same level as a management accountant.

The *Handbook* states:

Accountants and auditors held about 1.1 million jobs in 2002. They worked throughout private industry and government, but 1 out of 5 wage and salary accountants worked for accounting, tax preparation, bookkeeping, and payroll services firms. Approximately 1 out of 10 accountants or auditors were self-employed.

Many accountants and auditors are unlicensed management accountants, internal auditors, or government accountants and auditors; however, a large number are licensed Certified Public Accountants. Most accountants and auditors work in urban areas, where public accounting firms and central or regional offices of businesses are concentrated.

The petitioner originally indicated that it had five employees and three restaurants. The petitioner's organizational chart indicates that its employees include a president/store manager, accountant, cook/kitchen head, cashier, and server. In response to the director's request for evidence, the petitioner indicated that it had five restaurants and 23 workers and that the beneficiary performed accounting duties for all locations. The only DE-6 forms submitted in response to the director's request for evidence were those for one location, totaling five employees; the 2002 tax return of record indicates total wages paid in that year of \$45,420. In the appeal brief, the petitioner stated both that it had three locations and five locations. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*.

The petitioner's 2002 income tax return indicated gross receipt or sales of \$281,287. The petitioner's level of income has a direct and substantial bearing on the scope and depth of the beneficiary's proposed duties. The petitioner has not provided evidence that supports its contention that due to the size and complexity of its business the proffered duties are so complex and specialized that it is an accounting position requiring a baccalaureate level of education in a specialty occupation.

The *Handbook* reveals that many of the beneficiary's duties are performed by bookkeeping, accounting, auditing and financial clerks:

Bookkeeping, accounting, and auditing clerks are an organization's financial record keepers. They update and maintain one or more accounting records, including those that tabulate expenditures, receipts, accounts payable and receivable, and profit and loss. . . . post debits and credits, produce financial statements, and prepare reports and summaries for supervisors and managers. . . . handle the payroll, make purchases, prepare invoices, and keep track of overdue accounts.

More advanced accounting clerks may total, balance, and reconcile billing vouchers; ensure completeness and accuracy of data on account. . . . They may also review invoices and statements to ensure that all information is accurate and complete. . . . Auditing clerks verify records of transactions posted by other workers.

Financial clerks . . . record all amounts coming into or leaving an organization . . . keep track of a store's inventory. . . .

Auditing clerks verify records of transactions posted by other workers. They check figures, postings, and documents to ensure that they are correct, mathematically accurate, and properly coded.

The petitioner stated that the beneficiary would perform preparing the company's balance sheets, profit and loss statements, necessary checks, payroll, tax remittances, and other reports to summarize the company's current payroll, tax remittances and other reports to summarize the company's current and projected financial position. As shown in the *Handbook*, bookkeeping, accounting, and auditing clerks produce financial statements and prepare reports and summaries for supervisors and managers, which would be used by them to make sound business decisions. Further, the *Handbook* reports that employers require most financial clerks to have at least a high school diploma, and for bookkeepers and accounting clerks, they often require an associate's degree in business or accounting.¹

Based on the above discussion regarding the *Handbook's* information about management accountants and bookkeeping, accounting, auditing and financial clerks, the evidence in the record is insufficient to establish the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I): that a baccalaureate or higher degree or its equivalent is the

¹ According to the website for Skyline College, a community college located in San Mateo, California, (www.skylinecollege.net), an associate's degree in business or accounting would involve learning the fundamentals about financial accounting principles and concepts, balance sheets, income statements, cash flow statements, the GAAP, forecasting, budgeting, cost accounting, break even analysis, developing and operating a computerized accounting system using tools such as QuickBooks, QuickBooks Pro, or Peachtree, an integrated commercial accounting software package that is used to review, differentiate, and interpret accounting concepts and data in a multitude of business situations. Thus, an associate's degree would provide knowledge about the GAAP and accounting techniques which serve the needs of management and facilitate decision-making.

normal minimum requirement for entry into the particular position. The petitioner contends that the opinion letter from a professor of finance establishes that the proffered position requires an individual with a degree in accounting. The author of the letter stated that he reviewed the duties of the proffered position yet he did not indicate if he reviewed the duties in relation to the scope and nature of the petitioner's business. As the duties of the position have not been substantiated by the facts of record, the AAO will accord less weight to the testimony of the expert submitted by the petitioner. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel submits various internet postings for the position of accountant from various companies. However, the duties of the proffered position are not for those of an accountant, as discussed above.

No evidence in the record establishes the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) which requires the petitioner to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations. Nor can the petitioner establish that the particular position is so complex or unique that it can be performed only by an individual with a degree. As already discussed above, the *Handbook* reveals that many of the beneficiary's duties are performed by bookkeeping, accounting, and auditing clerks, occupations that do not require a bachelor's degree.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. As discussed above, the petitioner has not established how many restaurants it operates or the number of current employees, upon which it bases the complexity of the duties of the position. Upon review of the record, the petitioner has not documented the duties of the proffered position in relation to the nature of its business and the positions of its current employees such as a president/store manager, accountant, cook/kitchen heads, cashier, and server. Many of the beneficiary's duties are performed by bookkeeping, accounting, auditing and financial clerks, occupations that do not require a bachelor's degree. The petitioner's strategy for expanding its business cannot substitute for a description of the specific duties to be performed by the beneficiary. The petitioner submits no documentation in support of its plans for future growth. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner has not demonstrated that the duties of the proffered position meets the complexity or scope of responsibility normally required of an accountant. The petitioner therefore fails to establish 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

Counsel asserts that Citizenship and Immigration Services (CIS) has already determined that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the position offered in the prior case was similar to the position in the instant petition.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition would have been erroneous. Citizenship and Immigration Services (CIS) is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

Beyond the decision of the director, the petitioner asserts that the beneficiary has received the equivalent of a bachelor's degree in accounting based on his experience and education. The petitioner relies on an opinion letter which indicated that the beneficiary had demonstrated 19 years of progressive experience and 1½ years of university credits. The AAO notes that the letter from the Office of the Provost, Seattle Pacific University is dated more than three years before the professor of finance's opinion letter. As such, the AAO cannot conclude that Seattle Pacific University currently has a program for granting credit based on an individual's training or work experience pursuant to 8 C.F.R. § 214.2(h)(D)(I).² Additionally, the petitioner submitted one educational evaluation that determined the beneficiary had the equivalent of two years of university-level credit in business administration. The petitioner submitted a second foreign educational evaluation which indicated that the beneficiary has the equivalent of 1½ years of university level credit in business administration. It is not clear from the evidence submitted how many years of U.S. university equivalent credits the beneficiary has achieved. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Upon review of the experience letter from the beneficiary's previous employer, the duties have not been described with sufficient specificity in relation to the employer's business to establish that the alien's training and/or work experience included the theoretical and practical knowledge required by the specialty occupation and that the beneficiary's experience was gained while working with supervisors, or subordinates who have a degree or its equivalent in the specialty occupation pursuant to 8 C.F.R. § 214.2(h)(D)(5).

Thus, the record does not establish that the beneficiary is qualified to perform services in the specialty occupation. For this additional reason, the petition may not be approved.

² The website for Seattle Pacific University does not reveal that it has such a program.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.